BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDY MCNISH	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,659
LAWRENCE MEMORIAL HOSPITAL	)	
Respondent	)	
AND	)	
	)	
PHICO	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the July 19, 1999 Award entered by Administrative Law Judge Brad E. Avery.

APPEARANCES

Eric Kjorlie of Topeka, Kansas, appeared for the claimant. Steven J. Quinn of Kansas City, Missouri, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a June 25, 1995 accident and alleged injuries to the low back and neck. The Judge averaged a 22 percent wage loss with a zero percent task loss and awarded claimant an 11 percent permanent partial general disability. In determining the wage loss, the Judge imputed a post-injury wage of $206, which is the federal minimum wage, as claimant failed to make a good faith effort to seek employment following her termination from the respondent.

The respondent and its insurance carrier contend the Judge erred by imputing a post-injury wage. They argue that claimant failed to present any evidence of her post-injury ability to earn wages and, therefore, the Judge should have found a zero percent wage loss.

Further, because claimant allegedly failed to prove that she sustained any task loss as a result of the June 1995 accident, they argue that claimant did not lose any of her ability to earn wages. Therefore, for purposes of the permanent partial general disability formula, they argue that claimant's task loss should be zero percent and the difference in her pre- and post-injury wages should be zero percent. Finally, the respondent and its insurance carrier argue the Judge erred by stating in the Award that claimant may seek medical benefits in the future by filing an application for review.

The only issues before the Appeals Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

2. Did the Judge err by stating that claimant may seek medical benefits in the future by filing an application for review?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. The parties stipulated that Ms. McNish sustained personal injury by accident arising out of and in the course of her employment with Lawrence Memorial Hospital on June 25, 1995. On that date, while performing her duties as a certified nursing assistant, Ms. McNish was struck by a food cart and knocked to the floor. The accident caused pain in Ms. McNish's neck and low back.

2. Following that accident, Ms. McNish treated with the hospital's Dr. Chris Fevurly. While she was undergoing treatment, Dr. Fevurly permitted Ms. McNish to work light duty. But in September 1995, Ms. McNish resigned her position from the hospital as she was being assigned work that violated her temporary light duty work restrictions. In a note to her supervisor dated September 2, 1995, Ms. McNish wrote:

> As of this day 9-2-95, [I]n two weeks I will no longer be a LMH Employee. My last day will be 9-15-95. This is due to my back and neck, I feel that I can not [sic] do CNA work because of my back and neck. . . .

Ms. McNish's testimony is uncontroverted that she was assigned work that was beyond her work restrictions.

3. Following her termination, Dr. Fevurly continued to treat Ms. McNish. In November 1995, he released her from treatment with no permanent work restrictions or limitations.

4. Approximately two years after Dr. Fevurly's release, Ms. McNish consulted with board certified orthopedic surgeon Dr. Michael McCoy, first seeing him on October 27, 1997. Dr. McCoy prescribed anti-inflammatory medications hoping those would decrease the inflammation in Ms. McNish's back and relieve the back pain that she was having. The

doctor also ordered an MRI, which showed degenerative disc disease in Ms. McNish's back, early arthritic spurs at the L5-S1 level, and some bulging of the discs.

5. Based upon his evaluation, Dr. McCoy believes that the June 1995 accident aggravated Ms. McNish's arthritic spine. Because of the arthritic spine, which is now symptomatic, the doctor believes Ms. McNish should permanently avoid heavy lifting, avoid sitting too long in one position, avoid standing too long in one position, and avoid prolonged bending at the waist. Dr. McCoy last saw Ms. McNish in February 1998. At that time she was continuing to experience low back pain.

6. By letter dated January 20, 1999, Dr. McCoy states that Ms. McNish has a 6 percent whole body functional impairment, 3 percent of which preexisted her work-related accident. For purposes of this claim, the parties stipulated that Ms. McNish sustained a 3 percent whole body functional impairment as a result of the June 1995 accident.

7. The Appeals Board is persuaded by Dr. McCoy's testimony and finds that Ms. McNish now has a symptomatic arthritic lumbar spine as a result of the June 1995 accident. Further, the Appeals Board finds that because of the June 1995 accident she is now limited in her ability to work as she should observe those work restrictions and limitations provided by Dr. McCoy.

8. Since resigning from the hospital, Ms. McNish has not worked. When she testified at the April 1999 regular hearing, Ms. McNish had only contacted three or four potential employers.

CONCLUSIONS OF LAW

1. The Award should be affirmed.

2. As a result of the June 1995 accident, Ms. McNish now has a symptomatic arthritic lumbar spine, which has reduced her ability to work. Due to those work restrictions, she is no longer able to perform her former job as a certified nursing assistant.

3. Because hers is an "unscheduled" injury, Ms. McNish's permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the

> percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (Copeland, page 320.)

4. As indicated above, Ms. McNish has made minimal efforts to find employment. The Appeals Board concludes that Ms. McNish has failed to make a good faith effort to find appropriate employment and, therefore, a post-injury wage should be imputed.

5. The Appeals Board agrees with the Judge that the federal minimum wage of $206 per week should be imputed as Ms. McNish's post-injury wage. The hospital and its insurance carrier argue that the Board should impute as the post-injury wage the amount that she earned at the hospital. The Appeals Board finds that argument is without merit as Ms. McNish's injuries have rendered her unable to do the heavy lifting required in that type of work. As Ms. McNish can work, she is able to earn the federal minimum wage. There is no other evidence in the record that suggests Ms. McNish retains transferable work skills that would command a higher wage.

6. Comparing $206 to the average weekly wage of $264.87, the Judge found that Ms. McNish has a 22 percent difference in pre- and post-injury wages. The Appeals Board affirms that finding.

7. The Judge found that the record lacked evidence of task loss. The Board affirms that finding.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

8. Averaging the 22 percent wage loss with the zero percent task loss, the Judge found that Ms. McNish has an 11 percent permanent partial general disability. The Appeals Board agrees.

9. The hospital and its insurance carrier contend the Judge erred by stating in the Award that Ms. McNish could request medical benefits in the future by filing an application. The Appeals Board disagrees. Once an injury is found compensable under the Workers Compensation Act, an individual is entitled to receive medical benefits to treat that injury.[3] Also, that individual is entitled to receive benefits for every natural and direct consequence that flows from that injury.[4] And that would include medical benefits. The Judge did not err.

10. The Appeals Board adopts the Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the July 19, 1999 Award entered by Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eric Kjorlie, Topeka, KS
Steven J. Quinn, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

[3] K.S.A. 44-510.

[4] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).